

MT. HOOD CABLE REGULATORY COMMISSION

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Serving Multnomah County and the Cities of Fairview, Gresham, Portland, Troutdale and Wood Village

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February 1, 1999

Magalies Roman Salas
Secretary to the Federal Communications Commission
Federal Communications Commission
1919 M Street, NW Room 222
Washington, DC 20554

RE: *EX PARTE*
CS Docket 98-178

Dear Secretary Salas,

I respectfully enclose one original and two copies of our *ex parte* comments in connection with the proposed transfer of TCI licenses to AT&T (CS Docket 98-178). We are hopeful for your kind attention to our comments, and for the FCC's prompt action and guidance with respect to these important issues.

Thank you very much for your close attention to these issues. We look forward to the FCC's further action on these matters.

Sincerely,

Norman D. Thomas
Chair

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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

FEB - 2 1999

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In the Matter of

Joint Application of AT&T Corporation and
Tele-Communications, Inc. For Approval of
Transfer of Control of Commission Licenses
and Authorizations

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CS Docket 98-178

***EX PARTE* COMMENTS**
OF MT. HOOD CABLE REGULATORY COMMISSION

Norman D. Thomas, Chair
David C. Olson, Director

MT. HOOD CABLE
REGULATORY COMMISSION
1211 SW Fifth Ave
Room 1160
Portland, OR 97204
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January 29, 1999

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INTRODUCTION

"Those cut off from these high-speed networks today will find themselves cut off from the economic opportunities of tomorrow. And more importantly, they will be cut off from the most important network that there is – the network of our national community. FCC Chairman William Kennard ¹

The Mt. Hood Cable Regulatory Commission ("MHCRC") is an appointed group of ordinary citizens in the city and eastern suburbs of Portland, Oregon. The MHCRC was established to handle cable franchising and regulatory matters on behalf of six local governments.² The MHCRC meets monthly, and has for a number of years been accustomed to toiling in relative obscurity.³ MHCRC members typically view their task as primarily one of serving the public interest, protecting cable consumers, monitoring franchise compliance,⁴ and following as best we can the policies set forth by Congress, the FCC, applicable law, and the

¹Separate Statement of FCC Chairman William E. Kennard, January 28, 1999, *In the Matter of Inquiry Concerning the Deployment of Advanced Telecommunications Capability*, CC Docket No. 98-146 (available on FCC web page <www.fcc.gov>).

²The MHCRC was created in 1992 by local intergovernmental agreement to carry out cable regulation on behalf of Multnomah County and the Cities of Fairview, Gresham, Portland, Troutdale, and Wood Village ("MHCRC Jurisdictions"). Among other things, the MHCRC acts in an advisory capacity to the MHCRC Jurisdictions in connection with potential or proposed transfers or changes in ownership or control of any cable franchisee of the MHCRC Jurisdictions.

³MHCRC meetings only sporadically attract a noticeable amount of citizen turnout (depending on the issue at hand), and until the current AT&T/TCI transfer, MHCRC meetings were only rarely covered by the local press here.

⁴The MHCRC on behalf of its Jurisdictions oversees five separate cable franchises controlled by the two largest Multiple System Operators ("MSOs") in the nation: TCI (three small franchises servicing about 31,000 subscribers in the western portion of Multnomah County) and Time Warner (two franchises doing business as "Paragon Cable" in eastern Multnomah County servicing around 130,000 subscribers). The proposed AT&T/TCI transfer as submitted pursuant to FCC Form 394 requested approval of a change in control of TCI cable franchises in the City of Portland and Multnomah County only.

provisions of our cable franchises.⁵

On the night of November 16, 1998, the MHCRC's comfortable and customary anonymity ended.⁶ On that date, the MHCRC recommended that nondiscriminatory access to AT&T/TCI's planned high-speed internet cable modem platform be required as a condition of Portland and Multnomah County approving a change in control of TCI's local cable franchises to AT&T.⁷ It is in part the purpose of these *ex parte* comments to set forth with some particularity the policy and legal factors underlying the MHCRC recommendation. An initial survey of several of the factors influencing the MHCRC would include, the following, among others:

- ▶ the pro-competitive pronouncements and provisions of the Communications Act, particularly Title VI;
- ▶ a sincere attempt by the MHCRC staff to follow the FCC staff's latest thinking on "Internet Over Cable"⁸, and;

⁵The MHCRC's four current "Goals and Objectives", and an overview of MHCRC processes and procedures, is available on the MHCRC page on the world wide web at <www.mhcrc.org>.

⁶The *Wall Street Journal* in its November 19, 1998 edition referred to the MHCRC in its "Digits" column as the "Mouse that Roared."

⁷Resolution No. 98-12, Adopted by the MHCRC November 16, 1998. Section 2.2(f) of Res. 98-12 recommends the following condition, among others, be imposed on the AT&T/TCI transfer by Portland and Multnomah County: "*nondiscriminatory treatment of other providers in connection with TCI's proposed internet cable modem platform and services, and compliance with applicable cable commercial leased access requirements*" See Exhibit A hereto.

⁸Barbara Esbin, "*Internet Over Cable: Defining the Future in Terms of the Past*", OPP Working Paper No. 30, August, 1998, Federal Communications Commission (available on FCC website at <www.fcc.gov>). Ms. Esbin's paper was particularly relevant in its affirmation that "The FCC could reasonably conclude that cable Internet-based services, such as Road Runner, @Home and like offerings, when provided by a cable operator over its cable system in its franchised service area, come within the definition of "cable services" under Title VI." *Esbin* (page v).

- ▶ the public interest as expressed in our franchises and public process here.

A more detailed survey of these factors is developed in the remainder of these comments.

On December 17, 1998, the Multnomah County Board of Commissioners and the Portland City Council upheld the MHCRC recommendation by a nearly unanimous margin. To the best of our knowledge, Portland and Multnomah County thus became the first governmental entities in the nation to impose such a condition in a cable regulatory process.

TCI and AT&T on December 29, 1998 failed to submit an unqualified acceptance of the transfer conditions imposed by the City of Portland ("City") and Multnomah County ("County"). The proposed change in control was therefore automatically denied as of that date by operation of the original City ordinance and County resolution⁹.

On January 19, 1998, TCI and AT&T filed a Complaint against the City and the County in the United States District Court for the District of Oregon seeking "a declaratory judgment that the condition sought to be imposed by the (City and County) requiring carriage by TCI of unaffiliated providers of online and Internet access services, is unlawful and a violation of AT&T's and TCI's civil rights;" and "an award of damages in an amount to be proved at trial; and costs and attorneys fees."¹⁰

These *ex parte* comments are for the purpose of directly providing updated¹¹ information

⁹City of Portland Ordinance No. 172955, passed by the Council December 17, 1998, § 1.c. Multnomah County Resolution No. 98-208, adopted by the Board of County Commissioners December 17, 1998, § 2 . Both the City Ordinance and County resolution are available at the date of this filing on the MHCRC web page <www.mhcrc.org> under "Current Issues."

¹⁰AT&T et. al. vs. City of Portland and Multnomah County, Case No. CV 99-65 AA, U.S. District Court (D. Oregon), filed January 19, 1999, page 2 (hereafter "Complaint").

¹¹The MHCRC apologizes to the FCC for our lateness in submitting these *ex parte* comments, which we had originally hoped to submit to you last month (pursuant to Res. 98-15, adopted by

to the FCC regarding the MHCRC, City and County deliberations and action on this proposed change in control, and to inform the FCC of the subsequent litigation that has been filed against the City and County by TCI and AT&T. The litigation has been filed despite earnest City and County efforts (facilitated in part by the direct involvement of Oregon's senior United States Senator) to explore alternatives and compromises short of litigation¹². These comments are also intended to respectfully urge that the FCC promptly open a regulatory proceeding to assist in clarifying the matters at issue here, so that a nationwide resolution of these important national communications matters can be expedited.¹³

Particularly in light of the litigation now facing Portland and Multnomah County (and possibly other local governments as well in the near future)¹⁴, a federal solution led by the FCC is urgently requested. In making its original recommendation to Portland and Multnomah County,

the MHCRC on December 14, 1998). However, with events developing here at a breakneck pace, we wanted the FCC to have the most current information, up to and including the filing of the lawsuit by AT&T and TCI.

¹²Both City and County attorneys on January 7, 1999 wrote separate letters to TCI/AT&T local legal counsel urging AT&T and TCI to consider alternatives short of litigation, and stating that "a decision by AT&T and TCI to engage in litigation about this matter should not be either inevitable or a necessary result of this denial". The January 7, 1999 City Attorney and County Counsel letters are available at this time on the MHCRC web page <www.mhcr.org> under "Current Issues." The Mayor of Portland and Oregon Senator Ron Wyden also held subsequent informal discussions with AT&T/TCI representatives in order to attempt to reach a compromise. These efforts failed, and the lawsuit (*op. cit.* at fn 5) was filed as indicated on January 19, 1999.

¹³The MHCRC notes and expresses substantial concurrence with the actions requested by the letter filing of the Consumer Federation of America et. al. dated January 27, 1998 and addressed to Chairman Kennard, with copies provided to all FCC Commissioners.

¹⁴The MHCRC has learned that just prior to the date of this filing the City Council of Los Angeles, California has expressed support for open access as a policy matter, and that the County Executive of King County, Washington (comprising the suburbs of Seattle and including approximately 100,000 TCI cable subscribers) has recommended that the King County Council impose a similar 'open access' condition.

the MHCRC consciously sought to carry out what the MHCRC and its staff sincerely understood to be a broad, federally-encouraged policy of providing for competition, deregulation, and an open and accessible marketplace in communications and Internet access. The FCC's current open docket on the AT&T/TCI transfer presents an ideal opportunity for the FCC to consider the implementation of an open cable access policy at a national level. Whether the FCC chooses to impose such a requirement on the AT&T/TCI transfer request now pending, or whether the FCC chooses instead to open a separate rulemaking to consider the benefits of imposing or allowing an open access requirement industrywide on cable's planned high speed cable modem platform, the need for prompt and decisive FCC guidance in this area is clearly urgent.¹⁵

¹⁵The MHCRC notes that the FCC on January 28, 1999 announced release of a Report (No. CC 99-1) concerning the deployment of advanced telecommunications capability, or broadband, to all Americans pursuant to Section 706 of the 1996 Telecommunications Act. Although the FCC indicated that initial aggregate data suggested reasonable and timely deployment of broadband, the FCC press release also concluded that "it is too early to reach definitive conclusions", that the FCC intended to "closely monitor the deployment of broadband capability to all Americans," and that the FCC "would not hesitate to reduce the barriers to competition" where necessary. The MHCRC remains encouraged by the FCC's serious commitment to these issues, as reflected in the January 28th FCC press release and the separate statements on that date of each FCC Commissioner.

II. CHRONOLOGICAL PROCESS OVERVIEW OF MHCRC/PORTLAND/MULTNOMAH CONSIDERATION OF AT&T/TCI REQUEST FOR CHANGE OF CONTROL

"The challenge for the regulator, at each step, is to examine the underlying purposes and policy goals behind existing regulatory categories, and to apply them only where those purposes and policy goals make sense. Any regulatory efforts in this arena should begin with an analysis of whether the operator in question exercises undue market power over an essential service or facility necessary to provide an essential service." **Barbara Esbin**¹⁶

To understand the genesis of the imposition of the "open access" condition imposed by Portland and Multnomah County, it will be necessary to review the history of local franchising authority consideration of the change of control of TCI cable franchises to AT&T here. The process throughout has been governed by the applicable section of Title VI of the Communications Act¹⁷, and relevant FCC rules¹⁸.

A chronology, highlighting the development and imposition of the cable modem open access condition by Portland and Multnomah County, is as follows:

- September 2, 1998** FCC Form 394 filing received. FCC Form 394 filing requesting approval by the City of Portland and Multnomah County of the change of control of TCI cable franchises to AT&T was received by the MHCRC staff office. Assuming the original filing was complete, the 120 day time limit imposed by FCC rules required the City and County to act within 120 days or by December 31, 1998 or the transfer would be deemed approved without conditions.
- September 21, 1998** MHCRC established transfer consideration process. The MHCRC at its regular monthly meeting adopted a resolution establishing a process and timelines for a public hearing and MHCRC recommendations on the proposed transfer to the City Council of Portland and the Multnomah County

¹⁶Barbara Esbin, *"Internet Over Cable: Defining the Future in Terms of the Past"*, page 117, *op.cit.* at fn 8.

¹⁷ 47 U.S.C. 537

¹⁸ 47 CFR 76.502

- September 30, 1998** First staff letter to AT&T. MHCRC staff sent first formal letter requesting specific information from AT&T/TCI. The MHCRC staff letter asked the following question (among others): *Does the company plan to introduce cable modem internet services utilizing a proprietary platform? To what extent, if any, will TCI afford access to cable modem services to other Internet Service Providers on nondiscriminatory terms and conditions?*
- October 12, 1998** First AT&T reply. AT&T/TCI submitted a partial reply to the MHCRC staff letter (not all MHCRC questions were answered by AT&T/TCI). With respect to the modem question, the AT&T reply stated: "...*We plan to deploy @Home, a proprietary cable service.... We consider @Home to be a proprietary product. TCI intends to provide @Home as a cable service over its cable system and therefore is not subject to common carrier obligations.*"
- October 19, 1998** MHCRC public hearing. The MHCRC conducted a televised, live public hearing on the proposed AT&T/TCI transfer utilizing the facilities of Portland Cable Access. The hearing format provided for live (in-studio) public testimony, as well as telephone testimony and comments from viewers. As the minutes of this meeting²⁰ reflect, the most significant issue raised at the hearing (measured in terms of the amount of written and oral testimony) was the issue of nondiscriminatory access to TCI's cable modem platform. Written testimony on this issue was received (via email) in advance of the hearing by an interested ISP representative. Richard Horswell, President of Oregon Internet Service Providers Association (ORISPA) testified in person, along with James Deibele, CEO of Teleport. After the hearing, in open discussion (attended by TCI/AT&T representatives). **MHCRC members agreed that the cable modem access issue was significant, and the MHCRC directed its staff to pursue the issue.**
- October 30, 1998** Second staff letter to AT&T. MHCRC staff submitted a follow-up letter to AT&T/TCI requesting further information and comment on the open access issue, among others. With respect to the open access issue, the staff letter stated: *You may be aware that a number of local Internet Service Providers (ISPs) have provided testimony on this issue, and requested access by ISPs to the cable modem platform under nondiscriminatory terms and conditions.* The staff letter goes on to ask for responses to two legal questions to

¹⁹Res. No. 98-9, passed by the MHCRC September 21, 1998.

²⁰Minutes of this and other MHCRC meetings are available on the Mt. Hood Cable Regulatory Commission website, located at <www.mhcr.org>.

determine AT&T's view of the status of cable modems as 'cable services', and one business question as to whether AT&T intends to offer its own "AT&T WorldNet" Internet access service using TCI cables.

- November 10, 1998** Second AT&T reply. AT&T's second reply letter was received via fax on the evening of Monday, November 9, and reviewed by staff and legal counsel on Tuesday, November 10. Among other things, AT&T in this second letter re-asserted that @Home is planned "*as a cable service under current law*" and declared that applicable law prohibits local governments from regulating "telecommunications services" but not cable services. AT&T also asserted a novel legal position that cable commercial leased access rules can't apply because cable modem services are not "video programming."
- November 12, 1998** Proposed MHCRC action and ordinances distributed to AT&T/TCI. Proposed MHCRC resolution #98-12 in draft form, with attached proposed draft ordinances for consideration by Portland and Multnomah County, was distributed to AT&T/TCI, the public, and interested parties. Among other things, the proposed MHCRC resolution recommends "*nondiscriminatory treatment of other providers in connection with TCI's proposed internet cable modem platform and services, and compliance with applicable cable commercial leased access requirements*". The resolution also attached ordinances for the City of Portland and Multnomah County, including specific recommended implementing language regarding the open access condition.
- November 16, 1998** MHCRC adopts resolution and ordinances. At a crowded meeting at Mt. Hood Community College, the MHCRC took testimony from AT&T and TCI representatives, and further testimony from interested parties including three local Internet service providers ("ISP's"), US West, and members of the public. AT&T and TCI requested more time to review the proposed resolution and ordinances, but also indicated that they would not be willing to entertain any provision requiring access by third parties to their cable modem platform. After discussion, the MHCRC voted to send the resolution and ordinances, as drafted, to the Portland City Council and Multnomah County Commission. The "open access" condition recommended by the MHCRC is as follows: *Non-discriminatory access to cable modem platform. Transferee shall provide, and cause TCI to provide, nondiscriminatory access to TCI's cable modem platform for providers of internet and on-line services, whether or not such providers are affiliated with Transferee or TCI, unless otherwise required by applicable law. So long as cable modem services are deemed by law to be "cable services", as provided under Title VI of the Communications Act of 1934, as amended, Transferee and TCI agree to comply with all lawful requirements regarding such services, including, but not limited to, the inclusion of revenues from cable modem services and access within the gross revenues of TCI's cable franchises, and commercial leased access requirements*

- December 2, 1998** AT&T/Staff meeting, compromise proposed. AT&T/TCI representatives met with MHCRC staff and legal counsel and proposed compromise language on the Internet modem open access issue. The compromise language tentatively agreed to by AT&T representatives and MHCRC staff on the “open access” issue in essence changed the language from a requirement to a policy statement. These changes necessitated further MHCRC review.
- December 14, 1998** Mt. Hood Cable Regulatory Commission endorsed original language and rejected compromise. The MHCRC conducted a lengthy meeting to review the proposed compromise language (and make its final recommendation). After substantial discussion (including presentations and testimony by a number of interested parties) the MHCRC declined to endorse the limited “policy language” of the proposed compromise, and unanimously determined to support the language of the original MHCRC recommendation.
- December 17, 1998** Multnomah County Commissioners voted (4-1) and the Portland City Council voted (5-0) to uphold the uncompromised, original MHCRC recommendation approving the AT&T/TCI change in control, but imposing the open access condition, as unanimously endorsed by the MHCRC. TCI/AT&T were given 12 days to file an unqualified acceptance, or else the proposed change of control would be automatically denied.
- December 24, 1998** Commissioner Erik Sten (City of Portland) and Commissioner Sharon Kelley (Multnomah County) sent a letter to AT&T and TCI suggesting further dialogue and the exploration of alternatives short of litigation.
- December 29, 1998** AT&T filed a unilaterally-modified version of the acceptance form required by the City and County. The acceptance form provided by AT&T and TCI, among other things, deleted the open access condition. The AT&T/TCI cover letter to the modified acceptance form stated that AT&T would not agree to the acceptance conditions related to open modem access and would accept only “lawful” conditions.
- January 7, 1999** Following legal review by the City Attorney and County Counsel, the City and County notified TCI and AT&T that their requested change in control of TCI/Portland and TCI/Multnomah cable franchises had been initially denied (as of December 29, 1998) due to the failure of TCI and AT&T to submit an unqualified acceptance of the conditions attached to the transfer by the City and County on December 17, 1998. The City and the County continued to suggest further dialogue or the exploration of other alternatives short of litigation.
- January 19, 1999** Following unsuccessful attempts at compromise (including the intervention of Oregon U.S. Senator Ron Wyden), TCI and AT&T file a

lawsuit against the City of Portland and Multnomah County in U.S. District Court for the District of Oregon.

III. THE PUBLIC INTEREST

"In the two-and-a-half years since the 1996 Act passed, I'm concerned that consumers may have seen more changes for the worse in telecommunications than for the better. If there ever were a time for the Commission to ensure that consumers' interests don't take a back seat to the interests of telecom giants, it is now. One powerful tool the FCC has to make that happen is the imposition of meaningful merger conditions" **FCC Commissioner Gloria Tristani**²¹

There is no question but that the main issue resulting in the preliminary denial here of the proposed change in control of TCI cable franchises to AT&T was the disagreement among the parties regarding local authority to impose a nondiscriminatory access condition with respect to AT&T/TCI's planned high-speed cable modem Internet platform. This issue is unfortunately now the subject of litigation by AT&T and TCI against the City of Portland and Multnomah County----litigation the City and County sought diligently to avoid.²²

The Mt. Hood Cable Regulatory Commission respectfully submits that this is no ordinary cable transfer. Cable transfers in recent years have primarily involved rectifying the boundaries of local cable franchises so that the cable industry can realize economies of scale and competition through a 'clustering' strategy. Here, however, the MHCRC was not faced with a routine request for the transfer of one or more cable franchises from one Multiple System Operator ("MSO") to another.²³ Instead, the filing and the previous announcements from the parties described a

²¹*"Mergers, Consumers, and the FCC"* Remarks of FCC Commissioner Gloria Tristani before the National Association of Regulatory Utility Commissioners, November 8, 1998

²²See discussion in footnote 12, above.

²³The MHCRC has considered and processed several cable MSO to cable MSO transfers, and presently is considering a transfer request (filed with FCC Form 394 on December 22, 1998)

transfer with national significance: a change in control of one of the largest cable operators in the nation to one of the largest telecommunications companies in the world.

The requirement recommended by the MHCRC, providing for open access to the high speed Internet platform planned by AT&T and TCI, was heavily debated here at both the MHCRC level and before the elected bodies of Portland and Multnomah County. Ultimately, the Cable Commission unanimously recommended, and Portland and Multnomah County approved by substantial margins the open access provision (the combined City/County elected official vote was 9-1). Our view is that this is the position that best protects consumers, competition, technological innovation, and an open marketplace in the rapidly growing world of Internet information and commerce.

The MHCRC is aware this decision has attracted national and local interest, but the key point in our view is *the public interest*.

The public interest is clearly best served by providing for robust competition and choice in the thriving Internet market, a market which is clearly more important every day (as the FCC itself recognizes) when considered from a business or public policy perspective. "Open access" is especially important because of the critical need to ensure that a maximum variety of choices concerning high-speed access to the Internet be available to *users and citizens of any income level or social status*.

As the FCC is aware, the current narrowband business model for the most part sets forth

from TCI and Time Warner for transfer to TCI of the cable franchises presently held by Time Warner located in the eastern portion of the MHCRC's jurisdiction.

differential rates for high-speed access²⁴, *yet such differential rates for speed of access may not be technically necessary on the broadband pipe*. Surely the FCC does not seek to encourage an Internet access marketplace where the economically disadvantaged (e.g the poor, public schools, and libraries) are trapped in a low-speed, low-tech "text-only" Internet world, while businesses and the well-off enjoy the high speeds, dense graphics, and multimedia options growing every day on the Internet.

The MHCRC and City and County officials and staff here have discussed internally with great concern the implications of an "information-rich" vs. "information-poor" society. MHCRC staff has attempted to actualize the implications of "speed-rich" versus "speed-poor" Internet options by visualizing real-life scenarios, such as the following: imagine a 30-student classroom sharing one computer terminal where one student must wait twenty minutes or longer utilizing a 28 kbps telephone modem to download a graphically-detailed map of the Thirteen Colonies for a history report. Such a low-speed Internet connection will simply not be able to benefit all students in the limited time available. Yet a higher-speed DSL connection may be economically or technically infeasible for the school, and an alternative high-speed cable connection (if available at all) is reachable through only one platform and one provider which the school must "buy through" to reach its Internet Service Provider of choice.

Moreover, the proprietary platforms represented by "@Home" and similar developing cable services may not by any means become available universally and in all markets and franchise areas unless local governments retain and utilize the regulatory tools available under

²⁴That is, Internet access over the narrowband telephone wire is cheaper for 'dial-up' service at 56 kbps or less, but more expensive for ISDN and DSL service.

existing franchise agreements and federally-recognized consumer protection authority²⁵ to ensure that no *de facto* redlining or discrimination in price and availability occurs. This may well become an increasingly critical issue given the general availability of cable connections in urban areas, and the potentially superior technical “fit” for many households to the robust cable platform as compared with the more limited DSL and other options available on the narrowband telephone platform.²⁶

The development of a information “haves” and “have-nots”, divided by purchasing power, is a social result devoutly to be avoided²⁷ Yet we fear this result when Internet speed is related to economic capabilities, and this is the unfortunate result which appears to be developing on the telephone wire. The MHCRC hopes that the FCC will not through inaction encourage investment and deployment of a proprietary cable modem platform which will be dominated by a single, incumbent cable carrier. The need for open access on the broadband pipe remains a very significant issue, and the MHCRC earnestly recommends that the FCC approach this issue frontally by either imposing an open access condition on the AT&T/TCI merger, or else immediately moving to open a rulemaking docket on this matter.

²⁵See generally, Sec. 632 of Title VI of the Communications Act of 1934 [47 U.S.C. 552] concerning cable consumer protection and customer service, referencing the ability of local franchising authorities to exceed federal minimum consumer protection standards if necessary.

²⁶It is the understanding of MHCRC staff that the availability of the DSL platform is distance-limited and that the ISDN platform also has technical limitations which the cable modem platform does not.

²⁷As FCC Chairman Kennard has recognized. See quotation referenced in footnote 1 hereof.

IV. LEGAL CONSIDERATIONS

“Our shared goal of competition is one of the biggest ways in which we are on common ground---over the past year, the enemies of competition and change have learned that they are not going to profit from legalistic disputes about jurisdiction.” FCC Chair William Kennard ²⁸

The MHCRC and its staff have been frequently asked about our views regarding the basis for our authority to impose an open access condition at the local level. Since this matter is now in litigation, we are confident that a fuller and more formal statement of our legal views will be forthcoming in the judicial process. However, MHCRC staff and legal counsel have carefully reviewed this matter, and we are comfortable that our actions are lawful as well as in the public interest. A very brief overview of our views regarding local authority as well as the policy and process basis for our action would include the following, among other things:

- ▶ Section 613(d) of the Cable Act (Title VI of the Communications Act) specifically authorizes local authorities to impose pro-competitive conditions;
- ▶ Imposition of third party access requirements to a cable system is already required in various parts of cable law (e.g. PEG requirements and commercial leased access requirements)²⁹;
- ▶ The record of our process in Portland showed strong support for an open access provision

²⁸Remarks of William E. Kennard, Chairman of the Federal Communications Commission, to the National Association of Regulatory Utility Commissioners, Orlando, Florida, November 11, 1998 (available on FCC web page <www.fcc.gov>)

²⁹See Barbara Esbin, *“Internet Over Cable: Defining the Future in Terms of the Past”*, OPP Working Paper No. 30, August, 1998, *op. cit.* at footnote 8. Ms. Esbin’s paper contains a particularly useful discussion of PEG access, commercial leased access, and similar requirements under Title VI for third-party access to the cable platform (pp 102-113).

from consumers, businesses and interested parties³⁰;

- ▶ Our franchises allow us to impose appropriate public interest conditions related to AT&T's legal, financial, and technical abilities³¹; and
- ▶ in the absence of clear federal preemption or specific federal statutes or rules to the contrary, we think that the best reading of applicable federal law and telecommunications policy is one that is consistent with local authority to require open access to the high speed cable modem Internet platform in order to encourage competition and consumer choice on the nation's most critical "information superhighway."

In the final analysis, the MHCRC did not consider an "open access" requirement to be, in any manner, a constraining level of regulation on a nascent technology³². Rather, the thrust of the MHCRC recommendation was toward open markets---not regulation; toward competition---and not monopoly. We continue to feel strongly, on legal as well as policy grounds, that the essential nature of our open access recommendation was one that strongly encouraged the continued growth of an unfettered, unimpeded, vibrant Internet---with many choices available on many platforms---and we would oppose any regulations that demonstrably produce an opposite result.

³⁰See in particular, MHCRC meeting minutes of October 19, 1998; November 16, 1998; and December 14, 1998, available on the Mt. Hood Cable Regulatory Commission website, located at <www.mhcrc.org>.

³¹See, e.g., City of Portland/TCI franchise, §15.1(B)(2), Ord. No. 166469, passed by the Portland City Council April 28, 1993.

³²The MHCRC staff notes the comments of FCC Chairman William Kennard to the effect that "we must be very careful in imposing regulations on nascent technology" in an interview with Charlie Rose on or about January 15, 1999 on PBS, when Mr. Kennard was asked by Mr. Rose to comment on the open access requirement imposed by Portland and Multnomah County.

V. FCC ACTION NEEDED.

"...the policies of interconnection, equal access, and open architecture have served us well in the wireline context. Indeed, the concepts of connectivity and interoperability and openness are the lifeblood of the Internet. These principles are worth preserving. Some worry that any mention of these principles portends premature and excessive governmental intervention, jeopardizing investment and deterring build-out. Not so."

FCC Commissioner Susan Ness ³³

There is an urgent need for prompt FCC action to address the implications of the plans of cable MSOs, including ATT/TCI, to offer broadband services using franchised cable TV system facilities. The issues surrounding cable broadband have been raised both in the context of the proposed AT&T/TCI merger, CS Docket 98-178, and in the Commission's proceedings to implement section 706 of the Telecommunications Act, CC Dockets 98-146 and 98-147). In addition, many local franchising authorities and our local regulatory colleagues around the country have shared their concern with us regarding the likely negative impact on both consumers and the Internet of the cable industry as the bottleneck gatekeeper of broadband internet access . Should the FCC decide to approve the merger of these two companies, the FCC should condition its approval upon the outcome of the proceedings the FCC opens on these issues..

Ultimately, the importance of this issue transcends the business plans of AT&T. The need for the Internet to remain open and competitive is a matter of national policy and should be addressed on a national level. In the absence of FCC action, it is likely that the proprietary cable modem platforms will become the cable industry norm. This can only damage the openness and

³³*Deregulation: Pursuing Congress's Vision*, Remarks of FCC Commissioner Susan Ness, Federal Communications Bar Association, Washington, DC., January 20, 1999. (available on FCC web page <www.fcc.gov>)

innovation that has made the Internet the unfettered medium it is today.³⁴

VI. CONCLUSION

"It is true that the devil is in the details. And let's be candid about the fact that we are not always going to agree on every substantive issue. But we can and must agree to work together, to maintain an open dialogue for addressing our differences and resolving them as best we can." **FCC Chair William Kennard**³⁵

As the FCC has often recognized, the Internet is a critical information superhighway containing important public interest resources for all citizens (medical, government, education, etc.). The Internet was in fact begun for governmental and public interest---not commercial---purposes.³⁶ The recent and extraordinarily rapid development of the Internet into a commercial success ("e-commerce"), is to be applauded, and will enhance the Internet's importance as a gateway enabling consumers to bring competitive goods and services into their homes.

However, in the MHCRC's best judgment, home access to the Internet for most citizens for at least the next few years and beyond will continue to depend on the existing two wires already built to most homes: the telephone wire (narrowband), and the cable wire (broadband).

³⁴There is a further argument that locking out ISP's and other unaffiliated providers from wholesale access to the cable modem platform may also create unanticipated impacts on local right-of-way management, inasmuch as many such providers may seek additional local permit or franchise authority to deploy separate broadband facilities in local streets, many of them already congested or under severe management constraints due to the plethora of telecommunications providers in urban areas, including Portland.

³⁵Remarks of William E. Kennard, Chairman of the Federal Communications Commission, to the National Association of Regulatory Utility Commissioners, Orlando, Florida, November 11, 1998 (available on FCC web page <www.fcc.gov>)

³⁶A useful overview of early Internet history is traced in Barbara Esbin's paper, *op.cit.* at footnote 8 herein, pp 6-8. Esbin further cites Leiner, Cerf *et. al.* "A Brief History of the Internet" version 3.1 (revised Feb. 20, 1998) <<http://info.isoc.org/internet-history>>

Despite niche availability of wireless or other options yet unknown in some markets, the mass of people (rich and poor) will depend on the two wires already present. And these two wires will continue, in our best judgment, to provide the only realistic mass access to the Internet for most citizens.

Under enlightened FCC and federal policies, the MHCRC believes considerable progress has been made in opening up the telephone wire to competition by requiring the monopoly incumbents to provide wholesale access to resellers. This has reduced rates in long distance and data services, encouraged technological innovation, and broadened access for businesses and consumers..

However, the MHCRC would submit that similar progress on the far more robust broadband cable wire has barely begun. Yet, we know that cable's "fat pipe" is much more suitable in terms of technology, speed, and capacity to carry the ever-more-dense Internet content (particularly multimedia) that is becoming a necessity (by any objective measure) for adequate access to the Internet now and in the immediate future.

It is now abundantly evident from our process here that AT&T/TCI intend to do everything possible, including filing litigation, to maintain bottleneck control over the cable customer's initial entry to the high-speed cable Internet platform. Such control is maintained by requiring each cable customer to enter the high-speed Internet world only through the proprietary platform (e.g. "@Home", "Road Runner") of the incumbent cable operator, before reaching other platforms, ISP's, and content providers of the consumer's choice. Without a broad menu of wholesale access through the cable modem, it is not clear to us that the present great variety in narrowband retail access choices (through online providers and ISP's) will survive commercially

long enough to provide similar economically-disparate or technologically-vibrant competitive choices to future cable modem customers.

The MHCRC submits that such an anti-competitive scenario is clearly wrong. It is self-evidently not in the public interest. It appears contrary to every hard-earned lesson of public telecommunications policy this great nation has learned at least since the 1982 AT&T breakup.

If the current policy pronouncements of federal law have any real meaning, the MHCRC believes that the FCC, Congress, and franchising authorities should *together and immediately* be doing everything possible to prepare cable networks for the competitive, open cable platform which longstanding national communications policy clearly contemplates, and we should do so despite whatever statutory or categorical confusion may now exist³⁷, .

Such an open cable platform will develop more rapidly, consistently, and fairly if the FCC begins to take action to look into this matter by appropriate regulatory means, and if the FCC is careful in the meantime not to unjustly preempt or impair local effort, such as the MHCRC's, to spur competition through utilizing existing local franchising authority.

Finally, the MHCRC hopes that the present sporadic growth in high speed Internet access through narrowband or wireless options in some limited markets, though itself encouraging, is not mistaken by the FCC as reason to excuse the cable industry from a clear public need to open up its broadband platform to competition.

In our view, either action is pursued now, or else an overly timid 'wait and see' attitude (whether federal or local), will require all involved levels of government to spend many years in the future trying to 'retrofit' open access onto a monopolistic and proprietary broadband Internet

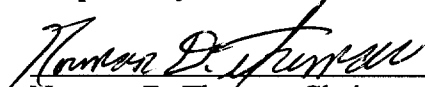
³⁷Esbin, *op.cit.* at footnote 8 herein, particularly pp 111-118.

platform: the same platform the cable industry is now rushing to deploy.

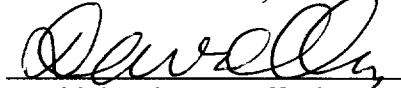
We urge the FCC not to lose track of the overall competitive "forest" in a rush to applaud the isolated narrowband or wireless "trees" of the moment. If the FCC mistakes current competition among ISPs on the narrowband wire as reason enough to forgo action, the MHCRC submits that the consequence of such inaction may cause vibrant competition and choice to disappear entirely if AT&T and TCI's business plans for Internet access on the broadband pipe prevail.

Surely, this is not the result intended by the FCC, nor is it the result intended by the citizens serving on the Mt. Hood Cable Regulatory Commission. We have attempted to follow the lead of our federal jurisdictional partner---the FCC---in recommending what seems to us a simple, common-sense requirement that consumers be assured a variety of choices, prices, and providers for increasingly-critical high-speed access to the Internet. Our reward thus far has been unlooked-for notoriety, litigation, and a dearth of federal guidance. We earnestly request that the FCC move promptly to address this situation.

Respectfully submitted,



Norman D. Thomas, Chair



David C. Olson, Staff Director

MT. HOOD CABLE REGULATORY
COMMISSION

1211 SW Fifth Ave, Room 1160
Portland, OR 97204

DECLARATION

I, David C. Olson, declare as follows:

1. I am Director of the Office of Cable Communications and Franchise Management of the City of Portland, Oregon and am staff director for the Mt. Hood Cable Regulatory Commission.
2. This declaration is submitted in support of these *ex parte* comments of the Mt. Hood Cable Regulatory Commission.
3. I have reviewed the factual assertions contained in these *ex parte* comments and I declare that they are true to the best of my knowledge.

I hereby state under penalty of perjury that the foregoing is true and correct.

Executed on January 31, 1999

A handwritten signature in black ink, appearing to read 'David C. Olson', written over a horizontal line.

David C. Olson

EXHIBITS
TO EX PARTE COMMENTS OF
MT. HOOD CABLE REGULATORY COMMISSION

- EXHIBIT A - **MHCRC Resolution No. 98-12:** *Recommend City of Portland and Multnomah County approve proposed change of control of TCI cable franchises (Portland, Multnomah, and Hayden Island) to AT&T, with conditions.* Adopted by the Mt. Hood Cable Regulatory Commission November 16, 1998 (3 pages total)
- EXHIBIT B - **Local (Portland, Oregon) press clippings, etc.:** including editorial from Portland *Oregonian* referring to statements from FCC Commissioner Gloria Tristani; and other press coverage of MHCRC, Portland, and Multnomah action on open access and AT&T/TCI transfer (including press coverage of lawsuit filed January 19, 1999 by AT&T/TCI against City of Portland and Multnomah County).

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Before the
Mt. Hood Cable Regulatory Commission
1211 SW Fifth #1160
Portland, OR 97204

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Recommend City of Portland and)	
Multnomah County approve proposed)	Resolution No. 98-12
change of control of TCI cable franchises)	Adopted by the Commission
(Portland, Multnomah, and Hayden)	November 16, 1998
Island) to AT&T, with conditions)	

Section 1. Findings.

- 1.1 Authority. The Mt. Hood Cable Regulatory Commission ("MHCRC" or "Commission") was created by Intergovernmental Agreement (dated December 24, 1992) ("IGA") to carry out cable regulation and administration on behalf of Multnomah County and the cities of Portland, Gresham, Troutdale, Fairview, and Wood Village ("the Jurisdictions"). Among other things, the Commission acts in an advisory capacity to the Jurisdictions in connection with potential or proposed transfers or changes in ownership or control of any cable franchisee of the Jurisdictions. As set forth in the IGA, changes in ownership or control of a cable communications system or a Grantee is an area where the Jurisdictions have reserved full authority to act on their own behalf, but each Jurisdiction has agreed to take no action in these areas until the Commission has had a prior opportunity to consider the matter.
- 1.2 Proposed TCI merger with AT&T. On September 2, 1998, MHCRC staff received formal notification of the proposed merger of TCI with AT&T. The proposed merger would affect the ultimate control and ownership of the TCI cable franchises of the City of Portland ("Portland franchise"), Multnomah County ("Multnomah franchise"), and Hayden Island ("Hayden Island franchise", issued originally by Multnomah County but substantially transferred to the City of Portland through annexation). The notification was accompanied by a version of FCC Form 394 "Application for Franchise Authority Consent to Assignment or Transfer of Control of Cable Television Franchise" containing four separate cover sheets (one for each FCC Community Unit Identification Number associated with the Portland, Multnomah, and Hayden Island franchises), but otherwise identical exhibits and attachments. The notification and FCC filing requested the consent of Multnomah County and the City of Portland ("Approval Jurisdictions") for the change in control of the Portland, Multnomah, and Hayden Island franchises (as applicable) in connection with the merger of TCI and AT&T.
- 1.3. Applicable franchise and legal provisions. The Portland, Multnomah, and Hayden Island franchises prohibit any transfer of control without the prior consent of the applicable Approval Jurisdiction. The Approval Jurisdiction may generally require further information regarding the proposed change of control, and condition its approval upon such conditions as are appropriate. Under FCC rules, 47 C.F.R. Sec. 76.502, the Approval Jurisdictions have 120 days from the date of submission of a completed FCC Form 394, together with all exhibits, and any additional information required, to act upon an application to sell, assign, or otherwise transfer controlling ownership of a cable system.
- 1.4 MHCRC staff and Commission review. On September 21, 1998, the MHCRC passed Resolution

No. 98-9, providing for review of the proposed transfer by MHCRC staff and legal and financial counsel and a schedule for a public hearing and further Commission action. The MHCRC also designated several MHCRC members as an ad hoc liaison group to monitor issues and information to be developed in the review process. Pursuant to Resolution 98-9, MHCRC staff on September 30, 1998 sent a letter to AT&T and TCI requesting further information. AT&T submitted a partial reply in a letter to MHCRC staff dated October 12, 1998. The Commission held a public hearing on October 19, 1998, and the Commission discussed the issues, appropriate conditions, and further information that should be requested in connection with the transfer request. MHCRC staff on October 30, 1998 sent a follow-up letter to AT&T and TCI requesting further information. AT&T and TCI replied to the staff letter on November 9, 1998.

- 1.5 Issues considered. Issues developed by MHCRC staff, and considered and discussed by the MHCRC, include the following, among others: (a) compliance with existing TCI franchise requirements; (b) documentation of AT&T and TCI corporate organization and financial projections; (c) completion of current TCI/Portland upgrade and commencement of Multnomah upgrade; (d) construction and completion of Portland institutional network commitments; (e) possible franchise fee arrearages that may have arisen through exclusion of certain advertising revenue or programmer payments; (f) treatment of other providers in connection with TCI's proposed internet cable modem platform and services, and potential application of commercial leased access requirements; (g) reimbursement of all MHCRC and Approval Jurisdictions direct costs incurred in analyzing and acting upon change of control request; (h) status of AT&T's affiliate TCG in connection with any unauthorized use of City of Portland rights of way by TCG; and (i) compliance with other applicable legal requirements, including carriage of broadcast digital and high definition television signals, and interconnection of cable system with potential competitors for purposes of sharing cable PEG channels, to the extent required by the applicable franchise agreement(s).
- 1.6 The MHCRC took further public input and conducted a work session before taking action on this matter on November 16, 1998 recommending that the Portland City Council and the Multnomah County Commission approve the proposed change in control, with conditions.

Now, therefore, the Commission resolves:

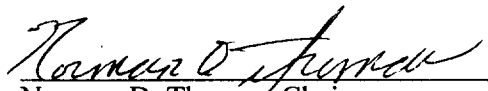
Section 2.

- 2.1 The Commission recommends that Multnomah County and the City of Portland consent to the proposed change in control of the Portland, Multnomah, and Hayden Island TCI cable franchises in connection with the merger of TCI and AT&T, subject to the inclusion of certain conditions addressed to the issues developed by the MHCRC in the review process, or otherwise customarily recommended for inclusion in the approval of any change in control of a cable franchise.
- 2.2 To address the issues identified by the Commission in its investigation and deliberations on this request for transfer approval, the MHCRC recommends the following conditions, among others, be included in the ordinance(s) (see Exhibits A & B attached hereto) to be considered by the Approval Jurisdictions:
 - (a) a commitment to unconditional compliance with existing TCI franchise requirements;
 - (b) timely submittal of updated AT&T and TCI corporate organization charts and proxy statements issued in connection with the merger when completed and publicly available;

- (c) an unqualified commitment to timely completion of the current TCI/Portland upgrade and a timetable for commencement of a comparable upgrade in the Multnomah County franchise area;
- (d) an unqualified commitment to timely construction and completion of TCI/Portland cable institutional network as specified in TCI/Portland franchise modifications (July, 1998);
- (e) cooperation in concluding a franchise fee compliance inquiry in connection with possible TCI franchise fee and Public, Educational, and Governmental ("PEG") access fee arrearages that may have arisen through exclusion of certain advertising revenue or programmer payments, and an express reservation of the legal rights of the City of Portland and Multnomah County in that regard;
- (f) nondiscriminatory treatment of other providers in connection with TCI's proposed internet cable modem platform and services, and compliance with applicable cable commercial leased access requirements;
- (g) reimbursement of all direct, out-of-pocket costs of MHCRC and Approval Jurisdictions incurred in analyzing and acting upon change of control request;
- (h) an express nonwaiver and reservation of the City of Portland's rights to fully exercise all applicable legal rights and authority, including levying fines or instituting litigation for trespass and ejectment, against AT&T's affiliate TCG in connection with any unauthorized use of City of Portland rights of way by TCG; and an express nonwaiver and reservation of the City of Portland's rights and authority against TCI for any material franchise violations that may exist in connection with any unauthorized use of TCI facilities by TCG;
- (i) compliance with all other applicable legal requirements, including carriage of broadcast digital and high definition television signals, and interconnection of cable system with potential competitors for purposes of sharing cable PEG channels, to the extent required by the applicable franchise agreement(s); and
- (j) unqualified acceptance by TCI and AT&T of the ordinances and conditions imposed by the City of Portland and Multnomah County, in a form acceptable to the Portland City Attorney and the Multnomah County Counsel.

- 2.3 In furtherance of these recommendations, the Commission recommends that the City of Portland approve an ordinance substantially similar in form to the one attached hereto as Exhibit A.
- 2.4 In furtherance of these recommendations, the Commission recommends that Multnomah County approve an ordinance substantially similar in form to the one attached hereto as Exhibit B.

ADOPTED BY THE COMMISSION on November 16, 1998


Norman D. Thomas, Chair

Reviewed by:


Ben Walters, Legal Counsel

Attachments:

Exhibit A: Recommended City of Portland consent ordinance; with conditions

Exhibit B: Recommended Multnomah County consent ordinance; with conditions

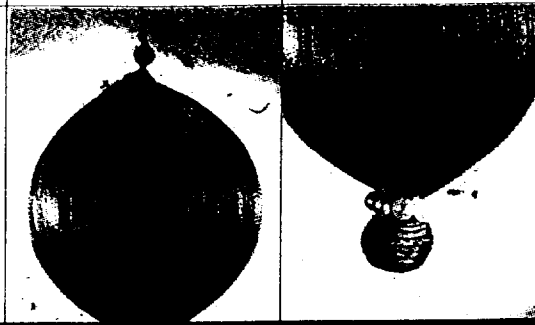
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BUZZ

MA BELL

An obscure local commission is making national headlines.

On Nov. 19, *The Wall Street Journal* called Portland's cable regulatory agency "the mouse that roared." That's because on Nov. 16 the tiny local agency—the Mount Hood Cable Regulatory Commission—recommended to Multnomah County and the Portland City Council that the \$31.5 billion proposed AT&T/TCI merger announced last June be held up until the telecom titans agree to certain conditions. Most important, the commission said, AT&T/TCI—which is planning to offer a new high-speed broadband Internet-access network—must open the network to other Internet-service providers like Europa and Teleport.

These ISPs currently use phone lines to put customers on the Internet and provide customized news pages and Web sites. AT&T/TCI's rival service, to be called @Home, would rely on a new technology that converts traditional cable lines into two-way lines, allowing super-high-speed Internet access. The ISPs say that they should be able to use



David Olson of the Mount Hood Cable Regulatory Commission believes in "trickle-up government."

AT&T/TCI's superior network to provide their own services. The commission agrees, arguing that otherwise the merged company would have a monopoly on Internet service.

The mouse may have roared, but the lion is growling back.

In a Nov. 19 letter sent to Mayor Vera Katz and Multnomah County Commissioner Beverly Stein, representatives from both AT&T and TCI said the commission lacked the jurisdiction to demand that the new network be open to competitors. AT&T's Oregon manager, Laura Imeson, says only the feds have the authority to require open access.

That is true, but first the merger must be approved at the local level in 900 jurisdictions nationwide. The Mount Hood commission is the first local regulatory body to raise the open-access issue. Ultimately, the this issue is up to the FCC, but Mount Hood commission director David Olson says he's using the theory of "trickle-up government" to force the issue.

The two companies are now rattling their legal sabers. In addition to the Nov. 19 letter to Katz and Stein, they sent a letter to the commission's legal counsel, Ben Walters, demanding an explanation of the commission's legal authority to set such a condition. Olson says that AT&T legal counsel Rick Thayer had some terse parting words after the public meeting where the commission made its open-access recommendation. "They are clearly threatening legal action," Olson says. "As Thayer was going out the door, he said, 'I hope you have a big budget.'" Thayer did not return WW's phone call.

On Monday City Commissioner Erik Sten met with representatives from both sides. Sten says he believes the city has the legal right to set conditions on the merger. "It's the height of irony to say the city doesn't have the right to make sure some local companies can compete," he says.

—Josh Feit

Panel says TCI must open network

The Mount Hood Cable Regulatory Commission voted Monday to force TCI to open its cable network to other Internet service providers.

TCI said the commission overstepped its authority. So did AT&T, with which TCI is about to merge. The \$48 billion merger is designed to use the cable network to provide a one-stop shop for local and long-distance phone service and Internet and cable services.

Major telecommunications rivals such as US West and other Internet providers such as Transport Logic and Europa Communications want to use the cable network just as they use telephone networks.

After Monday's vote, they are one small step closer to getting it.

That doesn't mean consumers are

much closer to getting an alternative Internet provider.

Much of the cable network still must be upgraded to handle two-way transmission. The issue also must be approved by the Portland City Council and the Mount Hood Commission. In addition, the Federal Communications Commission is studying the access issue and could overrule the Mount Hood regulatory commission.

AT&T and TCI objected to the commission's ruling, saying the panel lacks the legal authority to make and enforce it. AT&T might sue, said Rick Thayer, AT&T western division chief commercial counsel.

The vote is a victory for Oregon Internet service providers.

Oregonian 11/17/98

MONDAY, DECEMBER 14, 1998

Open bridges to cyberspace

FCC should insist that the public's access to the Internet not be restricted or monopolized by an AT&T - TCI merger

If you like to hear modern-day David versus Goliath stories, a fascinating one is unfolding this week in the Portland area. It could have bearing on how many bridges are left open for consumers who want a quick and affordable trip into cyberspace in the 21st century.

Here's the story: Two telecommunications giants, AT&T Corp. and Tele-Communications Inc. (TCI) have proposed a \$48 billion merger. It is designed to use TCI's cable network to provide a one-stop shop for local and long-distance phone service, and Internet and cable services. The companies, however, have told federal regulators that they shouldn't have to open their cable network to rivals such as America Online Inc., that want to provide Internet service over TCI's cable lines.

That kind of restriction wouldn't just block America Online, however. It also would prevent local Internet providers, such as US West, Transport Logic and Europa Communications, from using TCI's cable network as they use telephone networks now.

Why all of this should matter is pretty obvious. The AT&T-TCI proposal would stifle competition.

With a monopoly on the speediest link to the Internet, the merged companies wouldn't have to worry about price or program competition. Indeed, if AT&T and TCI are successful in blocking access to their architecture, consumers of alternate Internet providers would have to pay twice — once to TCI and once to their local Internet provider.

Enter the David in the form of Mt. Hood Cable Regulatory Commission, a citizens group that advises Multnomah County and Portland on such matters. The commission already has recommended that TCI be forced to open its cable-modem service to all Internet providers as a condition of the merger. Clearly this is the outcome that is in the consumers' best interest.

The cable commission meets today

to either reaffirm its recommendation, or to agree to compromise language that basically says that the merged companies will do whatever the Federal Communications Commission tells them to do. That's not much of a concession because, in the end, the companies have to follow what the FCC says anyway.

In the meantime, Multnomah County and the city of Portland, which have jurisdiction over TCI cable licenses, will vote on the issue Dec. 17. They can be the first of many local governments across America to recommend that the FCC establish strong Internet access condi-

tions before TCI's cable licenses are transferred to AT&T.

The advice from these jurisdictions is important because the FCC doesn't have to listen to a single, squeaky voice. We're confident, though, that at least one commissioner — Gloria Tristani — will hear Oregon's voice.

In a speech Nov. 8 before a regulatory utility commissioners association, Tristani said that the FCC had the authority to attach conditions to a merger to protect the public interest.

"Should we attach conditions that, in our judgment, would benefit consumers?" she asked. "I would answer that with a resounding yes. Merger conditions have the potential to bring consumers benefits that otherwise would be lost."

Even though any action taken in Oregon this week regarding the AT&T-TCI merger may not have official standing with the FCC, Oregonians interested in keeping all the bridges and ramps open and affordable to the Information Superhighway should be pleased with the effort.

And when the FCC votes on the merger next year, the Mt. Hood Cable Regulatory Commission should remind Tristani that she favors attaching conditions to mergers that support the public interest.

“(W)e can best serve consumers by imposing — where appropriate — pro-competition, pro-consumer conditions on mergers. If there are measures that would improve consumer welfare, the FCC can and should impose those conditions.”

Gloria Tristani
FCC Commissioner

REGIONAL MONDAY, Dec. 14/1998



PHOTOS BY JEFFREY J. HOLT FOR THE OREGONIAN

David Olson, executive director of the staff of the Mt. Hood Cable Regulatory Commission, recommended that the commissioners force AT&T and TCI to promise third-party access to their cable network. A compromise is in the works and will be voted on tonight.

Bad reception for AT&T

Net access issues pit the Mt. Hood cable commission against the telecom giant, merger partner TCI

By SU-JIN YIM

It was an odd moment of confrontation where one side clearly was outgunned.

The question was which side.

Seated at the table sat corporate giant AT&T Corp. and Tele-Communications Inc. (their pending \$42-billion merger hanging, they said, in the balance).

At the other table sat the Mt. Hood Cable Regulatory Commission, an obscure government body of eight volunteer citizens that meets monthly to munch cookies and oversee the cable television franchise in Multnomah County.

"Usually no one attends our meetings," said Commissioner Sue Dicle, a 47-year-old consultant who says her own mother isn't interested in the commission. "Nobody wants to talk to



The Mt. Hood Cable Regulatory Commission, including Sue Dicle and chairman Norm Thomas, has been thrust into the debate about who should regulate access to cable networks.

you about it at cocktail parties."

But the merger partners—with combined revenue of \$58 billion and a work force of 160,000—were intensely interested. They had sent three executives to a community college meeting room in Gresham in November to seek the commission's clearance for the merger.

The commissioners, an eclectic crew that included small-business owners, a Nike executive and experts in computers and multimedia, were hardly neophytes in the complex world of high tech telecommunications. They were a group marked, in part, by a consumer-oriented distrust of the corporations' methods and a sharp vigilance about the public's interest.

"We'll give you what you want, commission members told the corporate executives.

But at a price.

The price was a level playing field. That meant letting rival Internet access companies use the cable network built by the TCI Group, which includes the cable television arm of Tele-Communications Inc.

Outraged, the executives balked, insisting the issue was one for federal regulators.

"I hope you have a big legal budget," AT&T's lawyer said derisively as he left the meeting.

"I couldn't believe my ears," said cable Commissioner Ruth Miles, who represents the

**Please turn to
MT. HOOD, Page C5**

Mt. Hood: Cable regulatory agency isn't 'rolling over'

■ Continued from Page C1

3,000 residents of Wood Village. "I found that utterly indefensible."

But the commission may find its own decision hard to defend. The vote has thrust the commissioners and their nationally respected executive staff director into an industry-wide debate about the merger—as hopes fade for true competition in the telecommunications industry and questions arise about local jurisdiction in an increasingly nonlocal business marketplace.

The Federal Communications Commission, which is studying the issue, could overrule local regulators. Many in the industry, including the Metropolitan Area Communications Commission in Beaverton, which already cleared AT&T's path, say the Internet access issue belongs at the federal level.

"I've always been a person who supports opening up networks to competition," said Bruce Crest, administrator for the Beaverton area commission, which oversees cable television in the Tualatin Valley. "The big problem with this whole issue is the FCC's failure to address the issue in a timely matter. I think (the Mt. Hood commission) is trying to do something locally that unfortunately the FCC has been unable to do nationally."

Although the commission's votes are nonbinding, the Portland City Council and the Multnomah County Commission usually cast a final vote in favor of its recommendations.

Merger at stake, AT&T says

At stake, AT&T says, is the merger itself, which one day promises one-stop shopping for local and long-distance phone, high-speed Internet, data and cable services. The long-distance company, which faces thousands of similar meetings with local commissions nationwide, says it shouldn't be forced to allow rivals to reap the rewards of a \$1.8 billion upgrade in the cable network that will make Internet access by cable possible. But the cost to consumers and freedom of choice could be immeasurably higher, according to the Mt. Hood commissioners.

"I don't believe in handing one company absolute access or absolute control of one thing," said commission Chairman Norm Thomas, a 45-year-old senior programmer analyst from Troutdale.

At the heart of the legal and other maneuverings in this controversy is high-speed Internet access from the home. TCI's cable modem Internet service, which launched last month in some parts of the Portland area, promises speeds as much as 100 times faster than 28.8K modems that run over phone lines. That service costs \$40 a month.

Before it can bundle those services, AT&T and TCI must lumber their way through thousands of local jurisdictions for approval. The cable commissions, such as the Mt. Hood group, oversee TCI's rights to offer cable services locally and must grant permission to transfer those agreements to AT&T, which will run the combined company. Without those franchise agreements, AT&T's cable strategy is stuck.

Unlike the high-profile players who jockey for position in the litigious telecommunications industry, no one on the cable commission has a financial stake in the outcome.

The commission's members represent Portland, Multnomah County, Gresham, Troutdale, Wood Village and Fairview, not Wall Street or Hollywood. Among them are parents, musicians, retirees, a former city councilman and a onetime member of a citizens advisory group on animal control.

None, as Commissioner Rich Goheen put it, is a shrinking violet.

"I know what it is to deal with a national company," said Goheen, who retired six years ago as general manager for a Caterpillar equipment dealer. "If you let them run over you without taking a stand, then they'll run over you."

"Rolling over is not the right thing to do," echoed Thomas, a churchgoing father of two.

Still, critics say, AT&T's threat of a lawsuit, which the company says is still a possibility, has had a chilling effect. The commission's staff, led by Executive Director David Olson, who is also Portland's cable franchise director, is working with AT&T on a compromise that will soften the language over the access issue.

Compromise threatened

But by late Friday, the proposed compromise had grown shaky as AT&T counsel Rick Thayer and Olson accused each other of purposefully misconstruing the agreement.

"We've got to be able to stand with people with integrity," Thayer declared. "and when you cut a deal, that's the deal you cut."

The commission is scheduled to hear the new proposal at 6:30 p.m. today in Conference Room B on the second floor of the Portland Build-

ing, 1120 S.W. Fifth Ave. On Thursday, the Portland City Council and Multnomah County Commission will vote after weighing the cable commission's recommendation.

The proposed changes don't appear substantially different. The original commission vote clearly stated that AT&T must provide non-discriminatory access to the cable network for Internet service companies, which in turn provide Internet access for consumers. The proposed revision is more vague, directing AT&T and TCI to comply with all legal requirements of the franchise agreement, including nondiscriminatory access.

The issue has galvanized Oregon's trade group for Internet service companies, which spent the past week lobbying city and county officials to approve the original version. If existing Internet service companies can't access the cable network and must compete over slower phone lines, they could face extinction.

"They're being blackmailed."

That's what's going on," said Susan Hamill, president of Portland's One-World Networking, one of the Internet companies seeking access to the network. "It makes me very sad."

The Mt. Hood commissioners said that they know the issue probably is a federal one but that local bodies must have some say.

"Local folks need to be the watchdog," said Dicile, who raised the motion for the conditional approval at last month's meeting. "God knows, if you wait for the FCC, you'd really be in a bad way."

"It can become a national test case. If nothing else ... nationally they're going to have to ask the question," said Goheen, who says he's opposed to the merger on principle.

"The mouse that roared"

The decision has earned the commission national attention. The Wall Street Journal called it "the mouse that roared" for taking on the powerful corporate giants. Trade publications, telecommunications activists and other cable regulators are tracking the issue closely.

The commission isn't an overtly partisan or political group. But they are skeptical.

"I have a deep suspicion of anything the two of them are going to do, separately or together," said Miles, who said the 17 phone lines at her small business periodically fill up, one after the other, with marketing calls from phone companies.

But AT&T's Thayer, who attended last month's meeting and drew the ire of commissioners, said the commissioners are failing their constituents where it matters most — in the pocketbook.

In exchange for using city and county rights-of-way for its cables, TCI pays taxes to Portland and Multnomah County on the money it makes from its @Home cable modem Internet service. Opening up the cable network to Internet service providers, who don't have to pay such taxes, threatens that revenue, Thayer said.

"I think the citizens of Portland and the county would be interested to know that the city representatives and a cable staff person are making an attempt to reduce the revenue to the city and what the implications of that are," he said. "If we let ISPs in, it will take away market share. The city and county get

no money from Internet service providers."

The issue is likely to grow only more urgent. AT&T, which is pursuing partnerships with other cable companies to expand its cable customer base, is rumored to be in partnership talks with Time Warner.

To some extent, each of the commissioners depends on Olson, a Reed College graduate who has been Portland's cable franchise director for 15 years and is a former president of the National Association of Telecommunications Officers and Advisors.

A former cable company employee and founding member of Portland's Tygres Heart Shakespeare Company, Olson said last month's vote reflects a state of independent-

thinking mavericks. Oregon has stood out from other states by leading the way on issues such as medicinal marijuana, physician-assisted suicide and abolishing the state sales tax, Olson pointed out.

"It is a streak that is miles deep and miles wide and very, very Oregon," Olson said. "You see that all the way from the highest to the lowest level (of government), and the Mt. Hood commission is no exception."

The cable guys

The eight appointed commissioners and the key adviser of the Mt. Hood Cable Regulatory Commission oversee the cable franchises for Multnomah County, Portland and other area cities.

■ **NORM THOMAS**, 45, Troutdale: Commission chairman and senior programmer analyst at ADP Corp.

■ **ALAN ALEXANDER III**, 46, Portland: Independent multimedia producer and composer.

■ **SUE DICIPLE**, 47, Portland: Owner of a small consulting firm and former project manager for the governor-appointed Oregon Telecommunications Forum Council.

■ **RICH GOHEEN**, 62, Fairview: Retired, former general manager for Caterpillar equipment dealer.

■ **ROYAL HARSHMAN**, 50, Multnomah County: Accountant and former Gresham City Council member.

■ **BOB KREINBERG**, 53, Portland: Nike Inc. vice president of corporate logistics.

■ **RUTH MILES**, 34, Wood Village: Small-business owner and former board member of Multnomah Community Television.

■ **STAN SAUNDERS**, 66, Gresham: Retired, former technical and lighting designer for CBS and theater groups.

■ **DAVID OLSON**, 46, Portland: Portland cable franchise director and executive staff director of the commission.

The merger at a glance

■ **THE DEAL**: AT&T Corp. and Telecommunications Inc. announced their proposed \$48 billion, all-stock merger in June. The complex transaction would create AT&T Consumer Services, which would provide local, long-distance, wireless and international communications, cable television, and dial-up and high-speed Internet access services.

■ AT&T CORP.

Headquarters: New York
1997 revenue: \$51.3 billion
1997 net income: \$4.6 billion
Employees: 128,000
Primary business: Voice, data and video telecommunications services
Web site: www.att.com

■ TELE-COMMUNICATIONS INC.

Headquarters: Englewood, Colo.
1997 revenue: \$6.4 billion
1997 net loss: \$495 million
Employees: 32,300
Primary business: Cable television systems and satellite-delivered entertainment, information and home shopping programming
Web site: www.tci.com

Cable commission again takes on the big guys

■ The Mt. Hood Cable Regulatory Commission, which made national news a month ago, tells AT&T and TCI their compromise doesn't fly

By SU-JIN YIM

of The Oregonian staff

The Mt. Hood Cable Regulatory Commission again defied corporate giants AT&T Corp. and Tele-Communications Inc. Monday night, deciding that the companies should open their cable network to rival Internet providers.

The commission, which made national news last month for voting to force the companies to open the network, refused to accept a last-minute compromise proposal by AT&T, saying it didn't go far enough.

"The compromise falls ridiculously in favor of AT&T and TCI," Commissioner Stan Saunders said.

Though the cable commission's vote is a nonbinding recommendation, both the Portland City Council and Multnomah Board of County Commissioners tend to follow its lead. The City Council and county commission will vote on Thursday.

At the heart of the dispute is whether rival Internet service companies should be able to deliver high-speed Internet access to homes through TCI's cable network. TCI's new Internet service, dubbed @Home, promises Internet speeds as much as 100 times faster than 28.8k modems.

AT&T and TCI, who say their \$48 billion merger is at stake, have argued that it's unfair to force them to let competitors benefit from the billions of dollars it will cost to upgrade the entire network for the high-speed Internet access.

The companies want the issue decided at the federal level. The Federal Communications Commis-

sion, which held a hearing Monday in Washington, D.C., about the merger, is in the early stages of evaluating the deal but ultimately could overturn any local rulings.

Sue Dicile, a Mt. Hood Cable commissioner, said it's unlikely the FCC will act quickly.

"I don't accept the compromise. I believe it's just a punt to the FCC," Dicile said. "It will be a long time before we hear from the FCC — if we ever do."

The Internet access issue came before the Mt. Hood commission because AT&T must take over TCI's local cable franchise in Portland, Multnomah County, Fairview, Gresham, Wood Village and Troutdale for the merger to make sense. The companies face similar meetings in thousands of cities nationwide.

If the Portland City Council and Multnomah County Board of Commissioners follow the cable commission's recommendation, the companies then have 12 days to accept the terms. If they don't act, the transfer is denied. It's unclear what would happen next, but litigation is a clear possibility.

"I certainly hope they take into consideration the road they're going down," said Debbie Luppold, TCI's executive director of franchising and local government relations.

The City Council is scheduled to meet at 2 p.m. Thursday in council chambers in Portland City Hall, 1220 S.W. Fifth Ave. The Multnomah County Board of Commissioners is scheduled to meet at 10:15 a.m. in Room 602 on the sixth floor of the County Courthouse, 1021 S.W. Fourth Ave.

Oregonian 12/15/98

Agencies insist on open cable network

■ **AT&T and TCI must open cable network to rival Internet companies if they want to offer Internet access, Portland and Multnomah County say**

By SU-JIN YIM

of The Oregonian staff

Portland and Multnomah County scored two big wins Thursday in a closely watched clash over access to a potentially lucrative high-speed Internet gateway: the

cable network.

Both the Portland City Council and the Multnomah Board of County Commissioners told communications titans AT&T Corp. and Tele-Communications Inc. that they must open their cable network to rival Internet companies if they want to offer Internet access in Portland and other Multnomah County cities.

The companies, which have spent the past two months fighting the requirement, criticized the decision, saying it could jeopardize their planned \$48 billion merg-

er.

"What Portland is saying to the business community is when you build that better mousetrap, we'll give that technology over to your competitors," said Steve Kipp of TCI.

Thursday's votes pushed Portland and Multnomah County to the leading edge of a nationwide debate over opening the cable network — as hopes fade for true competition in the telecommunications industry and questions arise about local jurisdiction in an increasingly nonlocal

business marketplace. The discussion may continue in city halls across the country as local commissioners consider whether to approve the transfer of cable franchise agreements.

The issue centers on high-speed Internet access to the home. AT&T and TCI, which announced their merger in June, have said they want to use the cable network to sell local and long-distance phone, Inter-

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Cable: Firms say feds should decide

■ **Continued from Page C1**

net, data and cable services. If successful, it could finally bring local phone competition to consumers as well as Internet speeds, via cable modems, as much as 100 times faster than 28.8k modems.

But under the plan proposed by AT&T, consumers would have to pay twice to use an alternate Internet provider over the cable network — once to TCI and once to their Internet provider.

TCI and AT&T have consistently argued that federal regulators, not local councils and commissions, should decide the access issue. The Federal Communications Commission is studying the proposed merger, but it's unlikely to act on the access issue any time soon.

"We have no idea when the FCC will rule," said Portland city Commissioner Erik Sten. "We hope they will address this soon. Maybe our action will help encourage their consideration. If not, then it is all the more important that we address this ourselves."

The issue came before local jurisdictions only because AT&T must

take control of TCI's thousands of cable franchise agreements if it is to capitalize on its extensive cable operations.

The Mt. Hood Cable Regulatory Commission, a volunteer group of eight citizens, made national news last month when it voted to recommend to the city and county that access be required as a condition of the franchise transfer. The group, which oversees cable services in Portland, Multnomah County, Wood Village, Fairview, Troutdale and Gresham, defied the wishes of the merger partners, which, when combined, would have revenue of \$58 billion and a work force of 160,000.

Both the City Council and county commission Thursday decided to follow the cable commission's recommendation, saying consumer choice is vitally important.

The vote sets the stage for an expensive legal battle. Kipp said the companies will not accept the open-access condition, and that they have exhausted negotiation.

TCI and AT&T aren't the only ones with big stakes. US West, America Online and local Internet

service companies have fought for open access.

Richard Horswell, president of Oregon's trade group for Internet service providers, held out hope that the local Internet companies would be able to negotiate further with TCI and AT&T.

"In the end, the company will give on this," Horswell said. "That's the bottom line."

Under local requirements, TCI and AT&T have 12 days to accept the terms of the franchise transfer.

If they don't accept, the transfer is automatically denied. It's unclear what will happen next, but TCI will not cut off cable service, even if there is a protracted legal fight, said Debbie Luppold, executive director of franchising and local government affairs for TCI's Northwest division.

Luppold said the decisions might threaten the rollout of its cable modem Internet service in much of Multnomah County. It's already available in limited areas in Washington County.

"What we choose to do with our plant and the investment we choose to make in this market is dramatically impacted," Luppold said.

WALL STREET JOURNAL

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Pipe Dreams

Must AT&T Give Internet Rivals Access To TCI's Network?

Outcome of Battle in Oregon
Stands to Influence Shape
Of E-Commerce to Come

'Vacuum' at the Federal Level

By BRYAN GRULEY

Staff Reporter of THE WALL STREET JOURNAL

PORTLAND, Ore. — Is it time to regulate a powerful and lucrative new gateway to the Internet? Eight citizens of this city and its environs have volunteered the nation's first answer: A reluctant yes.

Their decision matters because the world is witnessing the birth of an industry with the Internet as its vehicle—that is motivating regular people to spend huge sums of money by clicking a computer mouse. Like the auto and steel industries of the early 20th century, online commerce is changing the way the economy works.

While the shift has been driven chiefly by the high-tech industry, regulators in cities, states and Washington, D.C., will play a big role in deciding whether it is fueled by competition, dominated by monopolists, or hamstrung with regulation. Policy makers are writing, or choosing not to write, rules that will determine who gets access to the pipelines that connect people to the Internet, and who fills those pipes with the stuff people want to watch, listen to, play with and buy.

Arguments for Access

Indeed, those are the issues already confronting regulators in AT&T Corp.'s proposed \$40.9 billion acquisition of cable giant TeleCommunications Inc. Consumer groups, Internet-service providers, or ISPs, and at least one Baby Bell telephone company want the Federal Communications Commission and municipal cable regulators to require AT&T to make TCI's cable network reaching about one third of the nation's homes available to any and all rivals who want to funnel Internet services through that network.

The reason: AT&T plans to spend billions of dollars to make TCI's network capable of delivering Internet service as much as 100 times speedier than what most consumers now see. This "broadband" technology provides, via cable modem, a fatter pipe through which AT&T can simultaneously supply video images, phone calls and World Wide Web pages that pop up as quickly as television channels. AT&T plans to offer this service exclusively through TCI's affiliate, At Home.

But here's the rub. Consumers who covet At Home's high-speed service but want to use, in addition, America Online Inc. or another ISP can do so only if they first agree to pay \$40 a month or so for At Home. That, contend AOL and others demanding direct access to the broadband network, would give AT&T too much control over the future of this industry.

Quite the contrary, argues AT&T. The Basking Ridge, N.J., company says it is offering what Congress wanted when it deregulated telecommunications three years ago—direct competition to the Baby Bells, which have a lock on local phone service. Even if it was technologically practical—AT&T says it isn't—AT&T doesn't think it should have to open its network to rivals that aren't taking the risk of buying and upgrading it. Such a burden would discourage other companies from investing in broadband technology too, the company argues.

'The Larger Competition'

"Is it more important to give people the flexibility to define 'access' the way they want, or is it more important to get competition for the Baby Bells?" posits Neil Goldschmidt, the former Portland mayor, Oregon governor and U.S. transportation secretary who has lobbied on AT&T's behalf. "I think there's a huge good in getting the larger competition."

While the cable pipe offers a handsome platform, it isn't the be-all, end-all of broadband. U.S. West and other Baby Bells are rolling out their own speedy Internet services, and wireless and satellite technologies show promise. Also, companies that snipe at each other over policy might turn around and become business partners tomorrow. Some observers believe that AOL, in particular, is using regulatory pressure to help it cut a deal with AT&T.

In Portland, the Mount Hood Cable Regulatory Commission, an eight-member panel of unpaid appointees, recommended last month that AT&T be required to offer

"nondiscriminatory access" to its cable platform. Elected city and Multnomah County officials adopted the rule—the first of its kind—as a condition of approving the transfer of TCI's cable licenses to AT&T. "We think this is a monopoly issue, we think this is a competitive issue, we think this is a compelling public-policy issue," says Sue Dicile, a Portland business consultant and Mount Hood commissioner.

AT&T has rejected the condition, contending that local regulators have no legal authority to impose it. The company this week told local officials that it would file a lawsuit in federal court to have the provision declared illegal. Meantime, Portland risks missing out on high-speed Internet service, says James Cicconi, AT&T's general counsel. "Consumers wind up losing," he says.

The Justice Department has already approved the merger, and the FCC isn't expected to impose an access condition on the deal itself. But the agency may consider separately whether all cable networks offering high-speed Internet service should be opened to rivals. That could take a year or more.

City regulators don't think they can afford to wait. In Los Angeles, Denver, Seattle, San Francisco and other cities, officials who oversee TCI's cable franchises are considering access rules. While AT&T has obtained approvals from more than 700 of the 1,000 communities that must approve the merger, the company is concerned enough that its top lawyer, Mr. Cicconi, has taken to visiting with city officials. But some cities are pressing on, following the trail blazed by Portland.

On Sept. 2 last year, three months after AT&T announced its plan to acquire TCI, the companies filed a routine application to transfer TCI cable franchises in Portland and Multnomah County to AT&T. The petition went to the Mount Hood Cable Regulatory Commission.

The commission's namesake is a mountain that lies east of Portland and is often shrouded in the low gray-and-blue sky of winter. The panel makes recommendations on cable regulation to elected city and county officials, who usually follow the advice when making decisions. The commissioners toil over tedious matters of franchise compliance for no pay and in virtual anonymity. Their last controversy involved an obscenity-law proponent who wanted to broadcast a public-access program called "Orgy TV." He didn't get on.



The Battle Over Access to TCI's Network

Continued From First Page

"We do this for the love of our city," says commissioner Ruth Miles, who co-manages an office building and runs her own graphic-arts business. "It's not something you talk about at a cocktail party."

The AT&T-TCI deal thrust the two women and six men into the middle of a fierce debate between AT&T and an unlikely coalition of opponents: the local Baby Bell, U S West Inc.; and a group of mostly small local ISPs, which themselves have been quietly abetted by AOL, the nation's largest such provider.

Ironical Alignments

U S West lent a touch of irony. The Denver-based Bell had just finished battling the local ISPs over a similar issue before Oregon phone regulators. The company had resisted opening its phone lines to rivals who wanted to use them to supply enhanced Internet service. After U S West lost that fight, it aligned with the ISPs and AOL to demand that AT&T's cable network be opened.

They found a sympathetic ear in David Olson, the Mount Hood panel's paid staff director and, according to his e-mail address, "cableczar." Amid the clutter of paperwork and Diet Coke cans in his downtown office, Mr. Olson, 46 years old, has won a national reputation as an aggressive regulator.

He had his own Internet epiphany three years ago, when his father contracted lymphoma. Mr. Olson jumped on his PC and in minutes was downloading the latest research papers and clinical trials on cancer, which he packed off to his dad. "I said to myself, 'This is unbelievable,'" he recalls. He has used the At Home product, and says it's "terrific."

He says he had thought about opening up cable networks before AT&T agreed to buy TCI, but the deal crystallized his thinking. With a gigantic phone company planning to bundle voice, video and data services, he felt it was crucial that its precious pipeline be opened to others, with fair reimbursement to AT&T.

When U S West and AT&T "are going to dominate the two wires that go into everybody's home, from pauper to king, they need to have that wire be available to serve other interests but their own," he says. "That's been the core of telecommunications policy for years."

Across the country, AOL was making the same argument to Washington regulators. Eventually Mr. Olson was speaking with Steven Teplitz, a Washington lobbyist for AOL. Mr. Teplitz also made contact with Richard Horswell, the 27-year-old head of a Portland ISP and president of a trade group representing 40 Oregon ISPs.

Forming a United Front

Mr. Horswell says his group had been aware of the issue, but his discussions with Mr. Teplitz "really helped focus our strategy." AOL hired a local lobbyist to work for the group and had its lawyers prepare a supporting brief. AOL and the ISPs also talked with U S West "to get our ducks in a row," Mr. Horswell says. "When it comes down to an issue as big as this, you can't afford not to work together."

In a Sept. 30 letter to AT&T, Mr. Olson asked if the company planned to offer ISPs access to the high-speed service "on nondiscriminatory terms and conditions."

AT&T responded in subsequent letters that At Home is a cable service and thus isn't bound by rules that require telephone companies to make their lines available to ISPs at a fair price. Nor did AT&T think the city had authority to impose such requirements: in AT&T's view, that more properly falls to the FCC (although AT&T doesn't think the FCC legally can require it to open its cable network either).

Cable laws include a number of requirements for third-party access to a network, but none cite Internet service. "It clearly is a gray area," Mr. Olson says. But "I come from an environment that says, unless the federal [law] says you can't do something, you can."

Oregon has long had an independent streak. The state has led the nation in confronting such touchy issues as assisted suicide and marijuana for medicinal use. Its autonomy showed again at the Mount Hood panel's Nov. 16 meeting, in a crowded conference room at a local community college.

Mr. Horswell, whose Europa Communications posts ads in the restrooms of some of Portland's many pubs, pleaded the ISPs' case. The commissioners found it compelling, in part because some of the small ISPs had been diligent about getting service to rural areas where bigger providers wouldn't want to bother. It was important that they not be crushed by AT&T, Ms. Dicile, the commissioner, says.

AT&T thought these small ISPs were mistaken. Many probably wouldn't be able to use the At Home architecture, the company says, and even if they could, the network couldn't handle many ISPs without risking a slowdown. But George Vradenburg, AOL's senior vice president for global and strategic policy, says the ISPs might be able to show the cable people a few things about expanding capacity. "I have enormous optimism in engineers," Mr. Vradenburg says.

The panel voted 5-2, with one member absent, to recommend imposing the access condition. Even those favoring the condition were torn, though. As a vice president at hard-driving Nike Inc. in nearby Beaverton, Commissioner Robert Kreinberg says he could sympathize with AT&T. "I'm not a big regulatory fan," he says. "But I think there are some issues where regulation is needed to maintain a sense of competition and fair play. It's like if I owned all the airports in the world and I owned an airline and said only my airline could land there."

Yet it's clear that the Mount Hood panel didn't address some questions that easily could arise if their rule sticks. For example, how would regulators ensure that AT&T doesn't favor certain ISPs over others? And what if the network really can't handle a limitless number of ISPs?

"We all agree this is a debate that would have been better to have at the FCC," Ms. Miles says. "But in the vacuum of leadership from the federal level, we have made this decision hoping they'll take notice."

Nor did AT&T address those broader issues at the November meeting, preferring to focus on the legal aspects. After the vote, AT&T lawyer Richard Thayer told Mr. Olson, "I hope you have a big budget." He wasn't smiling, Mr. Olson says. A spokeswoman for AT&T says Mr. Thayer was referring to potential legal costs for his company as well and didn't mean to sound aggressive.

Unanimous Backing

Efforts to reach a compromise failed, and on Dec. 14, the Mount Hood panel decided to reaffirm its earlier vote, and this time, they unanimously supported the access condition. Three days later, Portland city and Multnomah County commissioners adopted the recommendation with only one dissenting vote.

AT&T has since refused to sign off on the city and county license transfers because they contain the access condition. That, in effect, means the company's petition for the license transfers is denied. No immediate change in cable-TV service is expected because AT&T and TCI aren't expected to close their deal for several weeks, at least.

Earlier this week, AT&T and TCI officials paid courtesy calls on city and county officials to warn them that a lawsuit could be imminent. But AT&T held its legal fire while Oregon Sen. Ron Wyden, a Democrat, intervened in the hopes of brokering a compromise, sources close to the matter said.

Mr. Olson, the Mount Hood staffer, is scheduled to fly to Los Angeles today to brief cable officials there about the commission's actions. The Californians are paying his airfare.